PRIVY COUNCIL REPORT

R.R. CHELLIAH BROTHERS v. EMPLOYEES PROVIDENT FUND BOARD

[P.C. (Lord Reid, Lord Morris of Borth-y-Gest and Lord Donovan) February 8, 1971]

[Privy Council Appeal No. 31 of 1969]

Provident Fund — Lability of employer — Meaning of employee — Employee earning more than $500 a month — Employees Provident Fund Ordinance, 1951, ss. 2, 7 and First Schedule para. 2.

This was an appeal from a decision of the Federal Court of Malaysia ([1969] 2 M.L.J. 161) in an application by the respondents who sought a declaration that the appellants, a firm of advocates and solicitors practising in Kuala Lumpur, were liable under the Employees Provident Fund Ordinance 1951 for arrears of contributions amounting to $800 and interest and an order for payment. Raja Azlan Shah J. dismissed the application but the Federal Court by a majority (Azmi Lord President MacIntyre F.J., Ong Hock Thye C.J. (Malaya) dissenting) granted the respondents' application. The undisputed facts were: Before August 1960 one Kirpal Singh Brar was employed as an Inspector of Police. Contributions were paid and he became a member of the Fund. Then he resigned and went to England and after a course of study he was called to the Bar. Then on his return to Malaysia he was duly admitted to practise there as an advocate and solicitor. From September 1, 1964 until January 31, 1966 he was employed by the appellants. His salary was $501 per month later increased to $601 per month. The respondents maintained and the appellants denied that contributions to the fund were payable in respect of this employment.

Held, dismissing the appeal: the proviso to paragraph 2 of the First Schedule to the Ordinance applied in this case and as the employee had become liable to pay contributions under the Ordinance he was not excluded from the provisions of the Ordinance when his wages subsequently exceeded $500 a month, even though the subsequent employment was of a different character.

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R. R. Chelliah, John B. Baker and *M. Chong* for the appellants.

Michael Kerr Q.C. and *Robert Alexander* for the respondents.

Lord Reid (delivering the judgment of the Board): This is an appeal from a decision of the Federal Court of Malaysia of 24th January 1969 in an application by the respondents who are the Board administering the Fund set up by the Employees Provident Fund Ordinance 1951. They seek a declaration that the appellants, who are a firm of advocates and solicitors practising in Kuala Lumpur, are liable under that Ordinance for arrears of contributions amounting to $800 and interest and an order for payment. On 23rd May 1968 Raja Azlan Shah J. dismissed the respondents' application but the Federal Court by a majority (Azmi Lord President and MacIntyre F.J., Ong Hock Thye Chief Justice Malaya dissenting) granted the respondents' application.

The scheme of this Ordinance is that, with certain exceptions, all lower paid employees and their employers each contribute about five per cent of the employee's wages to the Fund to be held for the benefit of that employee. The employee then becomes a member of the Fund and the sums standing to his credit can only be withdrawn on his death, retirement or in certain other events.

The facts in this case are not in dispute. Before August 1960 Mr. Kirpal Singh Brar was employed as an Inspector of Police. Contributions were paid and he became a Member of the Fund. Then he resigned and went to England and after a course of study he was called to the Bar in England. Then on his return to Malaysia he was duly admitted to practise there as an advocate and solicitor. From 1st September 1964 until 31st January 1966 he was employed by the appellants. His salary was $501 per month later increased to $601 per month. The respondents maintain and the appellants deny that contributions to the Fund were payable in respect of this employment. Section 7 of the Ordinance imposes a liability in respect of every person who is an employee within the meaning of the Ordinance. Section 2 contains this definition of employee:

> " 'In this Ordinance, unless the context otherwise requires .....
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> 'Employee' means any person, not being a person of the descriptions specified in the First Schedule to this Ordinance, who has attained the age of 16 years and is employed under a contract of service or apprenticeship, whether written or oral and whether expressed or implied to work for an employer: ....."

The First Schedule specifies the persons excluded from this definition. The appellants submit that paragraph (2) applies so as to exclude their employment of Mr. Brar. It is in these terms —

> " '(2) Any person whose wages exceed 500 dollars a month:
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> Provided that where after an employee has become liable to pay contributions as provided in section 7 of this Ordinance, or would at any time but for the provisions of sub-sections (1), (1A) and (2) of section 16 thereof have become so liable, the wages of such employee at any time exceed 500 dollars a month such employee shall not by reason only of this paragraph be deemed to have become excluded from the provisions of this Ordinance, but his wages shall for all the purposes of this Ordinance be deemed to be 500 dollars a month:

The definition of "employee" in section 2 affords no direct assistance in the solution of the present problem: it excludes those to whom the First Schedule applies and therefore the real problem is the proper construction of paragraph (2) of that Schedule. That paragraph must be read as a whole. It does not exclude every person whose wages exceed $500 per month: it only excludes those to whom the proviso does not apply. So the question is whether on a proper construction the proviso applies to the employment of Mr. Brar by the appellants.

The case for the appellants can be stated in this way. By reason of the definition in section 2 we can substitute for the words "an employee" in the proviso the words "a person employed under a contract of service". Then the proviso will read "Where after a person employed under a contract of service has become liable to pay contributions ... the wages of such a person at any time exceed $500 a month ... ". They say that "such a person" (or "such employee") must mean a person who is still employed under the same contract of service as that which he became liable to

pay contributions. That is certainly a possible meaning. Indeed it may be the most natural meaning of these words. But in their Lordships' judgment it is not the only possible meaning.

Applying the words to Mr. Brar, when he was an inspector of police he was an employee: he then became liable to pay contributions: thereafter he was an employee of the appellants and at that time his wages exceeded 500 dollars a month. No violence need be done to the words of the proviso to make them apply in that way.

This is therefore a case where the words are capable of two meanings. It is therefore necessary to consider what are the consequences which follow from applying first one and then the other of these meanings. If the appellants are right it would be very easy for the employer to defeat the obvious intention of the proviso. All that he would have to do, if he proposed to increase the employee's wages beyond 500 dollars a month, would be to offer to the employee a new contract. The appellants seek to avoid that consequence by saying that so long as the employee is continuously employed by the same employer he can be regarded as being under the same contract of service. But that is a departure from the simplicity of their original argument. And even if this gloss could be accepted as a legitimate method of construction it would still leave serious anomalies.

Suppose that the owner of a business changes although the business remains the same and the employee continues to do the same work as before. This may happen because the owner dies or transfers the business to someone else. Then if the appellants are right the proviso can no longer apply. It cannot have been the intention of those who enacted the Ordinance in its present form that an employee should continue to have the benefit of its provisions although he might rise to be a highly paid manager provided that the business remained in the same ownership, but that, if at any time after his wage exceeded 500 dollars a month the ownership of the business changed, the proviso should immediately cease to operate so that he thereafter lost the benefits of the Ordinance.

In the present case there was a long break between Mr. Brar's employment as inspector of police and his employment by the appellants and those employments were wholly different in character. But their Lordships can find nothing in the Ordinance to justify a distinction on that ground. It must either be held that the proviso ceased to apply once the employee is employed under a different contract or by a different employer, or that once an employee has become liable to pay contributions and so long as he remains a member of the Fund he can never take any new employment of any kind, however large his salary may be, without his new employer becoming liable to pay contributions.

It was argued for the appellants that this would create anomalies as great as those which follow from the appellants' interpretation. It would mean that a man who begins his working life at a wage of less than $500 per month would always remain a contributor whereas a man who began with a wage of more than $500 per month would never become a contributor although both might for many years be receiving the same salary for similar highly responsible work. But it may have been decided as a matter of policy that the man who began as a lower paid worker should continue to have benefits not open to those who for one reason or another began their working life at a higher level. The only real difficulty is that an employer seeking to engage a man at say $1,000 per month may have some difficulty in ascertaining whether an applicant is already a member of the Fund. But it would seem improbable that such an employer would find any substantial difficulty in discovering whether an applicant is or is not a member of the Fund.

There was some dispute about the effect of the words in the proviso "such employee shall not by reason only of this paragraph be deemed to have become excluded". These word are necessary because some persons engaged in occupations specified in paragraphs (4) and (8) of the First Schedule might be receiving more than $500 per month. If these words were not included it might be thought that the proviso could be applied to them. These words cannot in their Lordships' view affect the proper construction of the earlier part of the proviso.

Their Lordships are accordingly of opinion that the construction of the proviso for which the appellants contend is wrong because it would lead to anomalous consequences and cannot have been intended but that the construction for which the respondents contend is sound and gives rise to no such difficulties.

Their Lordships will therefore advise the Head of State of Malaysia that the appeal should be dismissed. The appellants must pay the costs of this appeal.

Appeal dismissed.

Solicitors: *Graham Page & Co.* agents for *R. R. Chelliah Bros.; Coward Chance* agents for *Shook Lin & Bok.*